

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**D.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Upland, CA, Employer**

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**Docket No. 17-1446  
Issued: January 25, 2018**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
ALEC J. KOROMILAS, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On June 19, 2017 appellant filed a timely appeal from a May 1, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from OWCP's last merit decision, dated September 19, 2016, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of the claim.<sup>2</sup>

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

<sup>2</sup> Together with her appeal request, appellant submitted a timely request for oral argument pursuant to 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated November 1, 2017, the Board denied the request as appellant's arguments on appeal could be adequately addressed in a decision based on a review of the case record. *Order Denying Request for Oral Argument*, Docket No. 17-1446 (issued November 1, 2017).

## **FACTUAL HISTORY**

On March 20, 2013 appellant, then a 57-year-old mail carrier, filed an occupational disease claim (Form CA-2) alleging that she sustained carpal tunnel syndrome in both her upper extremities by performing her repetitive work duties over a period of time. She indicated that she first became aware of her claimed condition and first realized that it was caused or aggravated by factors of her federal employment on October 28, 2011. Appellant stopped work in July 2013.

OWCP accepted appellant's claim for bilateral carpal tunnel syndrome. Appellant received disability compensation on the daily rolls beginning July 11, 2013 and on the periodic rolls beginning February 9, 2014.

On August 15, 2013 appellant underwent right carpal tunnel release surgery and, on November 1, 2013, she underwent left carpal tunnel release surgery. These procedures were authorized by OWCP.

In a November 9, 2015 report, Dr. Sang V. Le, an attending Board-certified orthopedic surgeon, indicated that appellant had zero percent permanent impairment of her upper extremities under Table 15-35 and Table 15-36 on page 477 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6<sup>th</sup> ed. 2009) (A.M.A., *Guides*).

In January 2016 OWCP routed Dr. Le's November 9, 2015 report and rest of the case file to Dr. Michael M. Katz, a Board-certified orthopedic surgeon serving as an OWCP medical adviser, for review and a determination regarding whether appellant had permanent impairment of her upper extremities under the standards of the sixth edition of the A.M.A., *Guides*.

In a January 28, 2016 report, Dr. Katz indicated that the only appropriate method for evaluating the permanent impairment of appellant's upper extremities was to apply the standards of Table 15-23 (Entrapment/Compression Neuropathy Impairment) on page 449 of the sixth edition of the A.M.A., *Guides*. He recommended that a second opinion evaluation be conducted by a Board-certified specialist in orthopedic surgery or physical medicine/rehabilitation who was familiar with the standards of the sixth edition of the A.M.A., *Guides*.

On March 29, 2016 appellant filed a claim for compensation (Form CA-7) seeking a schedule award due to her accepted employment injury.

On March 30, 2016 OWCP referred appellant for a second opinion examination to Dr. Mark D. Bernhard, a Board-certified osteopath and physical medicine/rehabilitation physician, and requested that he provide an opinion on the permanent impairment of her upper extremities under the standards of the sixth edition of the A.M.A., *Guides*.

In a May 17, 2016 report, Dr. Bernhard discussed appellant's factual and medical history and indicated that she currently complained of pain, numbness, tingling, swelling, and loss of strength in her upper extremities. He reported the findings of his physical examination of appellant on May 17, 2016, including a positive Tinel's sign bilaterally, and diagnosed bilateral carpal tunnel syndrome, status post carpal tunnel releases. Dr. Bernhard provided a calculation

of the permanent impairment of appellant's upper extremities, finding that she had three percent permanent impairment of each upper extremity under Table 15-23 of the sixth edition of the A.M.A., *Guides*. He found that, for each upper extremity, appellant had a grade modifier of 1 for test findings, grade modifier of 2 for history, grade modifier of 1 for physical findings, and grade modifier of 2 for functional scale.<sup>3</sup>

In August 2016 OWCP routed Dr. Bernhard's May 17, 2016 report and the rest of the case file to Dr. Katz for review in his role as an OWCP medical adviser. It requested that Dr. Katz make a determination regarding whether appellant had permanent impairment of her upper extremities under the standards of the sixth edition of the A.M.A., *Guides*.

In an August 5, 2016 report, Dr. Katz indicated that he had reviewed Dr. Bernhard's May 17, 2016 report and noted that appellant had reached maximum medical improvement with respect to her bilateral upper extremity condition on May 17, 2016. He determined that, under Table 15-23 of the sixth edition of the A.M.A., *Guides*, appellant had three percent permanent impairment of each upper extremity. Dr. Katz found that, for each upper extremity, appellant had a grade modifier of 1 for test findings, grade modifier of 2 for history, grade modifier of 1 for physical findings, and grade modifier of 2 for functional scale based on a *QuickDASH* score of 41.

In a September 19, 2016 decision, OWCP granted appellant a schedule award for three percent permanent impairment of each upper extremity. The award ran from May 18 to September 26, 2016 and was based on the May 17, 2016 permanent impairment rating of Dr. Bernhard and the August 5, 2016 permanent impairment rating of Dr. Katz.

On February 6, 2017 OWCP received a January 29, 2017 letter in which appellant requested reconsideration of its September 19, 2016 decision. Appellant indicated that she disagreed with OWCP's determination regarding the permanent impairment of her upper extremities. She asserted that due to the updated findings of "recurring, bilateral carpal tunnel syndrome" by Dr. Ronald N. Kent, an attending Board-certified psychiatrist and neurologist, and the fact that she had permanent work restrictions due to this condition, she believed her request for reconsideration regarding the percentage of upper extremity permanent was "of good merit." Appellant requested consideration for "future medical" related to her work injuries, as substantiated by the most recent testing and diagnoses of Dr. Kent.

In his November 15, 2016 report, Dr. Kent noted that appellant presently complained of various upper extremity symptoms, including pain in her hands/fingers and numbness and tingling in her hands/fingers which radiated to both mid-forearms. He reported the findings of the physical examination he performed on November 15, 2016, noting that appellant had 5/5 strength and intact sharp sensation in her upper extremities. Dr. Kent advised that November 16, 2016 EMG and NCV studies of the upper extremities showed slowing of median sensory and motor nerve conduction across both wrists, diagnostic of a persistent or recurrent bilateral carpal tunnel syndrome, status post bilateral surgical releases. He indicated that appellant had a family

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<sup>3</sup> The record contains an undated document referencing April 2013 electromyogram (EMG) and nerve conduction velocity (NCV) studies which showed bilateral severe median neuropathy at both wrists, but the record does not contain a report of these studies.

history involving a father with diabetes mellitus and that she had been told she was prediabetic. Dr. Kent noted that it was his experience that patients with diabetes often demonstrate inadequate remyelination of the median nerve after successful surgical release. He could not rule out recurrent bilateral carpal tunnel syndrome and advised that clinical correlation “regarding these alternatives” was appropriate.

Appellant submitted several reports dated between July 2015 and January 2017 in which Dr. Usha Raghavan, an attending Board-certified internist, indicated that she could only perform modified work under specific restrictions. She also submitted a copy of a September 26, 2016 job offer from the employing establishment for modified work.

In a May 1, 2017 decision, OWCP denied appellant’s February 6, 2017 request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a). It found that the evidence/argument submitted by appellant in support of her reconsideration request was either cumulative or irrelevant to the main issue of the case. OWCP indicated that none of the submitted medical evidence contained an opinion regarding the extent of the permanent impairment of appellant’s upper extremities.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA does not entitle a claimant to review of an OWCP decision as a matter of right.<sup>4</sup> OWCP has discretionary authority in this regard and has imposed certain limitations in exercising its authority.<sup>5</sup> One such limitation is that the request for reconsideration must be received by OWCP within one year of the date of the decision for which review is sought.<sup>6</sup> A timely application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>7</sup> When a timely application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.<sup>8</sup>

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<sup>4</sup> This section provides in pertinent part: “[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.” 5 U.S.C. § 8128(a).

<sup>5</sup> 20 C.F.R. § 10.607.

<sup>6</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be “received” by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the “received date” in the Integrated Federal Employee’s Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>7</sup> 20 C.F.R. § 10.606(b)(3).

<sup>8</sup> *Id.* at § 10.608(a), (b).

The Board has held that the submission of evidence or argument which repeats or duplicates evidence or argument already in the case record<sup>9</sup> and the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>10</sup>

### ANALYSIS

The issue presented on appeal is whether appellant's February 6, 2017 request for reconsideration met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for further review of the merits of the claim.

The Board finds that appellant's request for reconsideration did not show that OWCP erroneously applied or interpreted a specific point of law; identify a specific point of law or show that it was erroneously applied or interpreted; or advance a new and relevant legal argument not previously considered by OWCP. Appellant submitted a November 15, 2016 report of Dr. Kent and argued that this report shows that she has more than three percent permanent impairment of each upper extremity, for which she previously received a schedule award. The underlying issue in this case is whether the medical evidence shows that appellant has more than three percent permanent impairment of each upper extremity. This is a medical issue which must be addressed by relevant medical evidence.<sup>11</sup> A claimant may be entitled to a merit review by submitting relevant and pertinent new evidence, but the Board finds that appellant did not submit any such evidence in this case.

In his report Dr. Kent reported the findings of the physical examination he performed on November 15, 2016, discussed November 16, 2016 EMG and NCV studies of the upper extremities, and posited that the findings of these studies could be due to either bilateral carpal tunnel syndrome or diabetes. The Board notes, however, that this report is not relevant to the main issue of the present case because Dr. Kent did not provide an opinion on the permanent impairment of appellant's upper extremities under the standards of the sixth edition of the A.M.A., *Guides*. As noted, the submission of evidence or argument which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>12</sup> Therefore, appellant's submission of Dr. Kent's November 15, 2016 report does not require reopening of her claim for further review of the merits.<sup>13</sup>

Appellant submitted several reports dated between July 2015 and January 2017 in which Dr. Raghavan indicated that she could only perform modified work under specific restrictions.

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<sup>9</sup> *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

<sup>10</sup> *Edward Matthew Diekemper*, 31 ECAB 224, 225 (1979).

<sup>11</sup> *See Bobbie F. Cowart*, 55 ECAB 746 (2004).

<sup>12</sup> *See supra* note 10.

<sup>13</sup> On appeal appellant argues that the medical evidence from Dr. Kent shows that she is entitled to additional schedule award compensation, but the Board has explained the deficiencies of this evidence with respect to this matter.

However, these reports also are irrelevant to the underlying issue of the present case because Dr. Raghavan did not provide any opinion on the extent of the permanent impairment of appellant's upper extremities.<sup>14</sup>

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Therefore, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

### **CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the May 1, 2017 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: January 25, 2018  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>14</sup> See *supra* note 10. Appellant also submitted a copy of a September 26, 2016 job offer for modified work, but this nonmedical evidence would not be relevant to the main issue of the present case.